This Recommended Order and Decision became the Order and Decision of the Illinois Human Rights Commission on 4/03/02.

STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF:	)		
	)		
JEFF DAUGHERTY,	)		
	)		
Complainant,	)		
	)		
and	)	CHARGE NO:	1998SN0144
	)	EEOC NO:	N/A
DEWITT COUNTY SHERIFF'S DEPARTMENT,	)	ALS NO:	S11345
	)		
	)		
Respondent.	)		

RECOMMENDED ORDER AND DECISION

On August 9, 2000, the Illinois Department of Human Rights (IDHR) filed a Complaint of Civil Rights Violation on Complainant's behalf alleging that Complainant was aggrieved by practices of retaliation prohibited by section 6-101(A) of the Illinois Human Rights Act (Act). A hearing was held in this matter on June 13 and 14, 2001. The parties filed closing briefs and other pleadings up to and including October 22, 2001. The record is now closed and the case is ready for decision.

Contentions of the Parties

Complainant, Jeff Daugherty, alleges that Respondent, Dewitt County Sheriff's Department, retaliated against him because he filed a 1995 charge of discrimination based on his marital status that resulted in a Complaint of Civil Rights Violation. Complainant further asserts he was fired in 1997 during the discovery stage of the discrimination claim because he had opposed unlawful discrimination.

Respondent contends that it terminated Complainant because he failed to make an arrest in violation of Illinois law. Respondent alleges it fully investigated the event and conducted an internal affairs arbitration before making the decision to discharge Complainant. Moreover, Respondent asserts Complainant cannot support a retaliation

claim because the charge of discrimination was made two years prior to the time of Complainant's discharge.

Findings of Fact

Those facts marked with asterisks are facts to which the parties stipulated. The remaining facts are those, after having considered all of the evidence in the record, I found were proved by a preponderance of the evidence. Assertions made in the record which are not addressed in this decision were determined to be unproven or immaterial to this determination.

1. Complainant, Jeff Daugherty, was hired by Respondent, DeWitt County Sheriff's Department, as a deputy on June 6, 1988.*

2. In 1991, Complainant was promoted to sergeant within the DeWitt County Sheriff's Department.*

3. On June 7, 1995, Complainant filed charge number 1995SN0863 with the Illinois Department of Human Rights (IDHR).* On April 20, 1996, IDHR filed a Complaint of Civil Rights Violation with the Illinois Human Rights Commission.

4. On June 13, 1997, Complainant served as supervising sergeant of the evening shift.*

5. During the evening of June 13, 1997, a county resident, Morris Lockard (Lockard), called the sheriff's office and reported he was aware of a warrant for his arrest.* He asked the dispatcher for permission to turn himself in at 5:00 a.m. the following day.

6. The dispatcher, John Dukes, indicated he would ask Complainant, the sergeant on duty, for permission and would inform Lockard of the answer.

7. Complainant gave Lockard permission to turn himself in the following morning with the warning that if Complainant came into contact with him before 5:00 a.m., he would immediately be arrested.

8. On June 13, 1997, Complainant advised Deputy Sheriff Robert Rybolt (Rybolt) that Lockard was expected to turn himself in on a warrant at 5:00 a.m. on June 14, 1997.* Rybolt was Complainant's subordinate.

9. On June 14, 1997, at approximately 2:30 a.m., the sheriff's department received a call from Lockard indicating he wanted to file a domestic battery complaint against his wife. Rybolt initially responded to Lockard's residence, followed by Complainant shortly thereafter.*

10. Both Complainant and Rybolt had knowledge of the warrant when they responded to Lockard's residence.*

11. Neither Complainant nor Rybolt arrested Lockard on the existing warrant while at Lockard's residence on June 14, 1997.*

12. On July 25, 1997, Respondent terminated Complainant for the events of June 13 and 14, 1997, namely, failing to arrest Lockard at his residence on June 14, 1997.

13. On August 21, 1997, Complainant filed a second charge of discrimination with IDHR alleging that his July 25, 1997 discharge was in retaliation for his initial charge of marital status discrimination.

14. On August 9, 2000, IDHR filed a Complaint of Civil Rights Violation on Complainant's behalf.

Conclusions of Law

1. Complainant is both an "employee" and an "aggrieved party" within the meaning of the Illinois Human Rights Act. 775 ILCS 5/2-101(A), and 775 ILCS 5/1-103(B).

2. Respondent is an "employer" within the meaning of the Illinois Human Rights Act. 775 ILCS section 5/2-101(B)(1)(c).

3. Complainant failed to establish a *prima facie* case of retaliation under the Illinois Human Rights Act.

4. It is not necessary for a complainant to prove a *prima facie* case of discrimination if a respondent articulates a legitimate, non-discriminatory reason for its actions.

5. Respondent articulated a legitimate, non-discriminatory reason for its actions.

6. Complainant failed to prove Respondent's articulated reason was a pretext for discrimination.

7. The Illinois Human Rights Commission does not have jurisdiction to override personnel decisions made by Respondent, as long as those decisions are not discriminatory.

Determination

Complainant failed to prove by a preponderance of the evidence that his discharge was a result of improper retaliation for filing a charge of marital status discrimination two years prior to his termination.

Discussion

The Illinois Human Rights Act makes it unlawful for an employee to be retaliated against "…because he or she has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing." 775 ILCS 5/6-101(A). In this case, Complainant asks the Commission to find that he was retaliated against by his employer for filing a charge of discrimination two years prior to his termination. The charge eventually culminated in a full hearing on the merits in 1999.

In order to succeed, Complainant must first prove a *prima facie* case of retaliation. The burden of production then shifts to Respondent to articulate a legitimate, non-discriminatory reason for its actions. If Respondent meets that burden, then the burden shifts back to Complainant to prove that the proffered reason is merely a pretext for discrimination. ***Zaderaka v. Illinois Human Rights Comm.,*** 131 Ill. 2d 172, 545 N.E.2d 684, 137 Ill. (1989).

To prove a *prima facie* case of retaliation, Complainant must establish that 1) he engaged in a protected activity, 2) Respondent took an adverse action against him, and 3) there was a causal nexus between the protected activity and Respondent's adverse action. ***Carter Coal Co. v. Human Rights Commission,*** 261 Ill. App. 3d 1, 633 N.E.2d 202 (5th Dist. 1994). Here, the first and second elements of Complainant's *prima facie* case are easily met. It is undisputed that on June 7, 1995, Complainant engaged in the protected activity of opposing what he believed to be unlawful discrimination based on

his marital status by filing charge number 1995SN0863 with IDHR. It is also undisputed that Complainant suffered an adverse act when Respondent terminated his employment on July 26, 1997. However, what remains in dispute is the existence of the third element of the *prima facie* case, i.e., the existence of a causal nexus between Complainant's protected activity and Respondent's adverse act.

There are three ways Complainant can establish the necessary "causal nexus" required to prove his *prima facie* case of retaliation under the Act. Those methods are: 1) showing direct evidence of retaliation; or 2) showing evidence of unequal treatment of similarly situated persons who did not engage in the protected activity; or 3) establishing that the time period between the protected activity and the adverse action is short enough to create an inference of "connectedness." ***Mitchell and Local Union 146,*** 20 Ill. HRC Rep. 101, 110-11 (1985). In this case, Complainant attempted to establish a causal nexus between his termination and the filing and pursuit of a charge of discrimination by using methods two and three as described above. Neither method was persuasive.

First, Complainant attempted to show that Rybolt received unequal treatment from Respondent when he failed to enforce the same arrest warrant against Lockard on June 14, 1997. This argument fails because Rybolt is not comparable to Complainant. Complainant was employed by Respondent as a sergeant whose rank bestowed upon him some supervisory duties within the sheriff's department. More specifically, Complainant was the supervisory sergeant on duty the same evening Rybolt failed to arrest Lockard. Rybolt was Complainant's subordinate and therefore cannot be compared to Complainant to demonstrate the existence of a similarly situated employee who was treated differently than Complainant.

Here, in order to establish a causal link to the Respondent's adverse act Complainant needed evidence of other sergeants or supervisory personnel who failed to make an arrest on a known arrest warrant and suffered no adverse action. While it is

true that Complainant attempted to establish that all sergeants employed by the sheriff's office would have presumably known about the existence of outstanding arrest warrants because they were kept in a central file, it does not establish with certitude the existence of a particular, identifiable sergeant who failed to arrest Lockard. No such comparative evidence was presented.

Next, Complainant attempted to establish a causal connection in this case by attempting to shorten the two year time span between the 1997 adverse act and the charge of discrimination he filed in 1995. Complainant's theory is that although the original charge of discrimination was filed in 1995, a Complaint of Civil Rights Violation was eventually filed in 1996 and discovery was ongoing at the time of his discharge, thereby minimizing the timeframe between the charge and the adverse act.

Specifically, Complainant argued (although the record did not support it) that an employee of the sheriff's department was completing written interrogatories at the time Complainant was terminated. The argument then follows that the time frame between the adverse act and the protected activity is shortened considerably, if not nullified, because Respondent was still painfully aware of the allegation of discrimination made by Complainant two years earlier.

While admittedly this is a novel theory, the record fails to answer the question of why Respondent did not retaliate against Complainant when it first learned of the charge of discrimination, but instead waited over two years to react. Given the facts of this case, it is nearly impossible for Complainant to establish a link to the protected activity of filing a charge of discrimination absent evidence of Respondent's employee's lament over answering interrogatories, coupled with a negative statement concerning Complainant's current employment status.

Moreover, my review of Commission precedent does not provide weight to Complainant's theory. In fact, the Commission has previously held that an inference of a causal connection between the adverse act and the protected activity may arise when

the events occur in close proximity in time. ***Stancil and Moo and Oink, Inc,*** ___ Ill. HRC___ (1989CF1534, November 22, 1993) at 5, *citing*, ***Thomas and Merrill Dow Pharmaceutical***, 14 Ill. HRC Rep. 8 (1984).

For example, in the case ***O'Malley and Metro. Water Reclamation Dist. of Greater Chicago,*** ___ Ill. HRC____ (1993CF1325, January 16, 1997), the administrative law judge considered a two year and five month time frame between the filing of a charge and an adverse act, a time frame similar to the one in the case at bar. In granting the dispositive motion in favor of Respondent, the administrative law judge reviewed Illinois Court and Commission precedent to determine an appropriate amount of time that could exist between the two events and still establish a causal nexus. A review of those cases proved that a short time span was necessary to establish the necessary link between and adverse act and a protected activity, with the outset timeframe for establishing such a connection being 4 1/2 months. ***O'Malley*** at 15. Based on past precedent it is clear that the two year time span in this case is too substantial to form the necessary causal nexus needed to form the third element of Complainant's *prima facie* case.

However, even given the fact that Complainant cannot meet his *prima facie* case, his action is still legally viable because Respondent articulated a legitimate, non-discriminatory reason for its actions. In doing so, Complainant is relieved of his burden to prove a *prima facie* case of discrimination, but is still required to prove Respondent's articulated reasons were merely a pretext for unlawful discrimination. ***Johnson v. Human Rights Comm.,*** 318 Ill. App. 3d 582 at 588, 742 N.E.2d 793 (2000), *citing,* ***Clyde v. Human Rights Comm.,*** 206 Ill. App. 3d 283, 293, 564 N.E.2d 265 (1990).

In this case, Respondent's articulated reason for discharging Complainant was that he failed to arrest Lockard under a known warrant for his arrest in violation of Illinois law. In order to prove Complainant's discharge was a pretext for unlawful discrimination, Complainant would have to show that Respondent's proffered reason is "unworthy of

belief." ***Stancil and Moo and Oink, Inc,*** ___ Ill. HRC___ (1989CF1534, November 22, 1993) at 7.

Much of the testimony at public hearing focused on facts presented at the internal affairs arbitration. In fact, portions of the internal affairs arbitration transcript were offered, but denied, as evidence at hearing. In wasting much of the hearing time on whether Complainant's arbitration proceeding was properly decided or whether his termination was improper following the internal affairs investigation, it occurs to me that Complainant missed the important issue in this case. That is, was his discharge the result of Complainant's 1995 charge of discrimination, as to opposed to the incorrect issue of whether or not Complainant's discharge was proper at all.

In other words, Complainant's goal at hearing seemed to be to convince me that the Complainant's termination after the internal affairs investigation was unreasonable. However, as the Commission has previously held, the appropriate standard to apply in determining whether Respondent's articulated reason was merely a pretext for unlawful discrimination is not whether the Respondent's reason for its action was "inherently unreasonable," but whether was it "unworthy of belief." ***Stancil*** at 7. Nothing in the record demonstrated that Respondent's reason for discharging Complainant was "unworthy of belief."

Complainant's discharge did not prove to be discriminatory. Nothing in the record demonstrates that Complainant was terminated for anything other than a failure to arrest Lockard. Nothing more, nothing less. It is true Rybolt was not terminated for the same failure to make an arrest, but again, Rybolt was not Complainant's comparable for purposes of establishing discrimination because he was Complainant's subordinate. It is difficult to tell why Rybolt was not disciplined for his conduct, but that is not for determination by this Commission. It is well established that the Commission cannot second guess a business decision made by an employer as long as the decision is not discriminatory. ***Garner and IDOT,*** ____ Ill. HRC_____ (1989SF0594, April 23, 1996).

Complainant would have this Commission believe that his employer cannot terminate him for any reason at all while a pending charge of discrimination or Complaint of Civil Rights Violation exists, without the risk of the termination being viewed as discriminatory. That proposition is simply not logical.

RECOMMENDATION

Based on the above findings of fact and conclusions of law, I recommend that the Illinois Human Rights Commission dismiss with prejudice the Complaint, together with underlying charge number 1998SN0144 against Respondent Dewitt County Sheriff's Department.

ILLINOIS HUMAN RIGHTS COMMISSION

KELLI L. GIDCUMB
Administrative Law Judge
Administrative Law Section

ENTERED THIS 7TH DAY OF FEBRUARY, 2002.